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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH A. MARESSA,,
Petitioner,
vs.

NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMAN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBER NARUS, jointly, severally and in the alternative,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. In a civil proceeding for libel, brought by a public official, a New Jersey State Senator, against a magazine, its owner, publisher, editor-in-chief, an editor and the three reporters who wrote the subject story, do the First Amendment to the United States Constitution, Article I, paragraph 6 of the New Jersey Constitution, and the New Jersey "Shield Law", N.J.S.A. 2A:84A-21 *et seq*, afford an absolute privilege against revelation of sources and defendants' editorial processes, in light of the United States Supreme Court decision in *Herbert v. Lando*, 441 U.S. 153, 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979), in which this Court held, inter alia, that an individual's interest in his reputation is as basic a concern as any other right, and that editorial processes are discoverable, and the heavy burden of proof placed upon defamation plaintiffs by Constitutional considerations in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), and its progeny?

2. Does the interpretation given the New Jersey "Shield Law", N.J.S.A. 2A:84A-21, *et seq*, by the Supreme Court of New Jersey in this case amount to a denial of equal protection and due process of law by, in effect, abolishing the right of public officials and public figures to bring a civil action for defamation since the requirement of *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), that these defamation plaintiffs prove subjective malice, as therein defined, will never be met under this interpretation?

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No.

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NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMAN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBER NARUS, jointly, severally and in the alternative,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

JOSEPH MARESSA, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-titled case on May 6, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 89 N.J. 176, 445 A.2d 276 (1982) and is printed in Appendix A hereto, *infra*, page 1a. The Order of the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-18536-79, dated October 15, 1980, is printed in Appendix C hereto, *infra*, page 33a.

JURISDICTION

The judgment of the Supreme Court of New Jersey (Appendix A, infra, page 1a) was entered on May 6, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY CONSTITUTION
Article I, Paragraph 6

6. Liberty of speech and of the press; libel; province of jury

6. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

N.J.S.A. 2A:84A-21

2A:84A-21. Newspaperman's privilege

Rule 27.

Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere,

a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.
Amended by L.1977, c. 253, §1, eff. Oct. 5, 1977.

2A:84A-21a. Definitions

Unless a different meaning clearly appears from the context of this act, as used in this act:

a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.

c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.

d. "Magazine" means a publication containing news which is published and distributed periodically, has a paid circulation and has been entered at a United States post office as second class matter.

e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.

g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

h. "In the course of pursuing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eye-witness to, or participant in, any act involving physical violence or property damage.
Added by L.1977, c. 253, §2, eff. Oct. 5, 1977.

2A:84A-21.1 Subpena; disclosure of information; application of act

Where a newsperson is required to disclose information pursuant to a subpena issued by or on behalf of a defendant in a criminal proceeding, not including proceedings before administrative or investigative bodies, grand juries, or legislative committees or commissions, the provisions and procedures in this act are applicable to the claim and exercise of the newsperson's privilege under Rule 27 (C.2A:84A-21).
L.1979, c. 479, §1, eff. Feb. 27, 1980.

2A:84A-21.2 Time of proceedings

Proceedings pursuant to this act shall take place before the trial, except that the court may allow a motion to institute proceedings pursuant to this act to be made during trial if the court determines that the evidence sought is newly discovered and could not have been discovered earlier through the exercise of due diligence. L.1979, c. 479, §2, eff. Feb. 27, 1980.

2A:84A-21.3 Prima facie showing subpenaed materials obtained during professional activities; waiver of privilege or other grounds for disclosure; hearing

a. To sustain a claim of the newsperson's privilege under Rule 27 the claimant shall make a prima facie showing that he is engaged in, connected with, or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated, and that the subpenaed materials were obtained in the course of pursuing his professional activities.

b. To overcome a finding by the court that the claimant has made a prima facie showing under a. above, the party seeking enforcement of the subpena shall show by clear and convincing evidence that the privilege has been waived under Rule 37 (C.2A:84A-29) or by a preponderance of the evidence that there is a reasonable probability that the subpenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issues of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific materials published.

c. The determinations to be made by the court pursuant to this section shall be made only after a hearing in which the party claiming the privilege and the party seeking enforcement of the subpena shall have a full opportunity to present evidence and argument with respect to each of the materials or items sought to be subpenaed.
L.1979, c. 479, §3, eff. Feb. 27, 1980.

2A:84A-21.4 In camera inspection; hearing; determination of admissibility; order for production

Upon a finding by the court that there has been a waiver as to any of the materials sought or that any of the materials sought meet the criteria set forth in subsection 3.b., the court shall order the production of such materials, and such materials only, for in camera inspection and determination as to its probable admissibility in the trial. The party claiming the privilege and the party seeking enforcement of the subpena shall be entitled to a hearing in connection with the in camera inspection of such materials by the court, during which hearing each party shall have a full opportunity to be heard. If the court, after its in camera review of the materials, determines that such materials are admissible according to the standards set forth in subsection 3.b., the court shall direct production of such materials, and such materials only.
L.1979, c. 479, §4, eff. Feb. 27, 1980.

2A:84A-21.5 Hearings; findings of fact and conslusions of law

After any hearing conducted by the court pursuant to sections 3 or 4 hereof, the court shall make specific findings of fact and conclusions of law with respect to its rulings, which findings shall be in writing or set forth on the record.
L.1979, c. 479, §5, eff. Feb 27, 1980.

2A:84A-21.6 Appeals; stay of penalty; sealing of record; return of privileged material

An interlocutory appeal taken from a decision to uphold or quash a subpena shall act as a stay of all penalties which may have been imposed for failure to comply with the court's order. The record on appeal shall be kept under seal until such time as appeals are exhausted. In the event that all material or any part thereof is found to be privileged, the record as to that privileged material shall remain permanently sealed. Any subpenaed materials which shall, upon exhaustion and determination of such appeals, be found to be privileged, shall be returned to the party claiming the privilege.
L.1979, c. 479, §6, eff. Feb. 27, 1980.

2A:84A-21.7 Co-defendants; notice of proceedings, right to intervene

Where proceedings are instituted hereunder by one of several co-defendants in a criminal trial, notice shall be provided to all of the co-defendants. Any co-defendant shall have the right to intervene if the co-defendant can demonstrate, pursuant to section 3 [N.J.S.A. 2A:84A-21.3] that the materials sought by the issuance of the subpena bear upon his guilt or innocence. Where such intervention is sought by a co-defendant, that co-defendant shall be required, prior to being permitted to participate in any in camera proceeding, to make that showing required of a defendant in section 3.
L.1979, c. 479, §7, eff. Feb. 27, 1980.

2A:84A-21.8 Assessment of costs or counsel fee

If the court finds no reasonable basis for requesting the information has been shown, costs, including counsel fee, may be assessed against the party seeking enforcement of the subpena. Where an application for costs or counsel fee is made, the judge shall set forth his reasons for awarding or denying same.
L.1979, c. 479, §8, eff. Feb. 27, 1980.

2A:84A-21.9 News media person or entity; freedom from searches and seizures of documentary materials; exceptions

Any person, corporation, partnership, proprietorship or other entity engaged on, engaged in, connected with, or otherwise employed in gathering, procuring, transmitting, compiling, editing, publishing, or disseminating news for the public, or on whose behalf news is so gathered, procured, transmitted, compiled, edited, published or disseminated shall be free from searches and seizures, by State, county and local law enforcement officers with respect to any documentary materials obtained in the course of pursuing the aforesaid activities whether or not such material has been or will be disseminated or published.

This section shall not restrict or impair the ability of any law enforcement officer, pursuant to otherwise applicable law, to search for or seize such materials, if there is probable cause to believe that:

a. The person, corporation, partnership, proprietorship or other entity possessing the materials has committed or is committing the criminal offense for which the materials are sought; or

b. The immediate seizure of the materials is necessary to prevent the death of or serious bodily injury to a human being; or

c. The giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration or deliberate concealment of the documentary materials other than work product; or

d. The documentary materials, other than work product, have not been produced in response to a court order directing compliance with a subpena duces tecum, and

(1) All appellate remedies have been exhausted by the party seeking to quash the subpena duces tecum; or

(2) There is a probability that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person, corporation, partnership, proprietorship or other entity possessing the materials shall be afforded adequate opportunity to submit an affidavit to the court setting forth the basis for any contention that the materials sought are not subject to seizure.
L.1979, c. 488, §1, eff. Feb. 28, 1980.

2A:84A-21.10 Applications for search warrant; approval

In the event a search warrant is sought pursuant to Section 1 of this act, all applications to the court for such warrants shall be approved in advance of their submission by the Attorney General or the prosecutor of the county in which execution of the warrant will take place.
L.1979, c. 488, §2, eff. Feb. 28, 1980.

2A:84A-21.11 Civil cause of action for damages due to violation

a. A person, corporation, partnership, proprietorship or other entity aggrieved by a search for or seizure of materials in violation of this act shall have a civil cause of action for damages for such search or seizure:

(1) Against the State of New Jersey, or against any other governmental unit, all of which shall be liable for violations of

this act by their officers, employees, or agents while acting within the scope or under color of their office, employment or agency.

(2) Against an officer, employee or agent of the State of New Jersey or any other governmental unit who has violated this act while acting other than within the scope or under color of his office, employment or agency. It shall be a complete defense to a civil action brought under this paragraph that the officer, employee or agent had a reasonable good faith belief in the lawfulness of his conduct unless his error is due to an ignorance of an official statement of the law.

b. The state of New Jersey or any other governmental unit, liable for violations of this act under paragraph 3(a)(1), may not assert as a defense to a claim arising under this act the immunity of the officer, employee or agent whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judge.

c. The remedy provided by paragraph 3 a.(1) against the State of New Jersey or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this act, against the officer, employee or agent whose violation gave rise to the claim, or against the estate of such officer, employee or agent.

d. A person, corporation, partnership, proprietorship or other entity having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000.00, such punitive damages as may be warranted, and such reasonable attorney's fee and other litigation costs reasonably incurred as the court, in its discretion, may award; provided, however, that the State of New Jersey or any other governmental unit shall not be liable for interest prior to judgment.

e. The Attorney General is authorized to settle a claim for damages brought against the State of New Jersey under this section and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this act by an officer, employee or agent of the State of New Jersey or any other governmental unit and for the imposition of administrative sanctions against such officer, employee or agent if warranted.

f. A county prosecutor may settle a claim for damages brought against the county of his jurisdiction or any other governmental unit under this section.
L.1979, c. 488, §3, eff. Feb. 28, 1980.

2A:84A-21.12 Definitions

As used in this act: a. "Documentary materials" means materials upon which information is recorded and includes, but is not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, outtakes and interview files.

b. "Work product" means any documentary materials created by or for a person in connection with his plans, or the plans of the person creating such materials, to gather, file, procure, transmit, compile, edit, publish or disseminate news for the public, except such work product as constitutes contraband, or the fruits, instrumentalities or evidence of a crime.

c. "Any other governmental unit" includes any branch, subdivision or agency of the government of the State or any locality within it.

d. "Attorney General" means the Attorney General of the State of New Jersey, or his designee.

e. "County prosecutor" means the duly appointed prosecutor of a county, or his designee.
L.1979, c. 488, §4, eff. Feb. 28, 1980.

2A:84A-21.13 Inapplicability of act to rights of department of corrections

Nothing contained in this act shall be construed to limit the right of the Department of Corrections to search the offices of inmate newspapers or the public information offices of any inmate organization located within a correctional facility.
L.1979, c. 488, §5, eff. Feb. 28, 1980.

NOTE: "Subpena" is reproduced as contained in the official report.

NEW JERSEY EVIDENCE RULE 37

RULE 37. Waiver of privilege by contract or previous disclosure; limitations

A person waives his right or privilege to refuse to disclose or prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.

A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to one question shall not operate as a waiver with respect to any other question.

L.1960, c. 52, p. 459, §29. [N.J.S. 2A:84A-29].

STATEMENT

This civil action for libel arose from the publishing of an article entitled "Rating the Legislature" in the October, 1979, issue of New Jersey Monthly magazine. Plaintiff, then State Senator, JOSEPH A. MARESSA was included in "The Worst" category. Named as defendants were the magazine, the publisher and editors of the magazine, and the authors of the specific article.

Interrogatories were served upon defendants, and depositions of the three reporters were taken in the early months of 1980. By way of this discovery, plaintiff sought identification of the sources of the information contained in the article, as well as rough drafts of the article, notes, memos and other written documentation gathered in the course of compiling the article. The response of defendants to each of these inquiries was that the information was privileged. During the depositions, defendants' counsel raised the privileges contained in the First Amendment to the United States Constitution, the New Jersey Constitution, and the New Jersey Newspaperman's Statutory Privilege, N.J.S.A. 2A:84A-21, *et seq.*

Plaintiff filed a motion with the trial court seeking an order compelling disclosure of the information sought by way of discovery. The issues raised were briefed by all parties, and the trial court heard oral argument. That court's ruling is embodied in the Order dated October 13, 1980 (Appendix C, page 33a).

Thereafter, defendants sought leave of the Superior Court of New Jersey, Appellate Division, to file an interlocutory appeal from the trial court's Order. Leave to appeal was granted. While the matter was pending, unheard, in the Appellate Division, the case was certified to the New Jersey Supreme Court. That court's opinion was rendered on May 6, 1982 (Appendix A, page 1a).

Directly at issue are the rights and privileges of "the press" guaranteed by the First Amendment of the United States Constitution, Article I, paragraph 6 of the New Jersey Constitution, and the New Jersey "Shield Law", vis-a-vis the rights and privileges of persons in the field of defamation law, be they ordinary citizens or public officials or public figures, whose burden of proof in defamation actions is defined in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).

The New Jersey Supreme Court decision (Appendix A, page 1a, "*Maressa* decision") recognized the interplay of the United States and New Jersey Constitutions upon the development of the New Jersey Shield Law. Prior to the *Maressa* decision, the recent New Jersey Supreme Court opinions relating to the Shield Law were in the realm of criminal proceedings, where the Sixth Amendment to the United States Constitution presented a countervailing right. See *State v. Boiardo*, 82 N.J. 446, 414 A.2d 14 (1980), after remand, 83 N.J. 350, 416 A.2d 793; *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), cert.den.sub.nom. *New York Times v. New Jersey*, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670.

The New Jersey Supreme Court disagreed with the dissenting Justice's (Appendix B, page 24a) finding that the New Jersey Constitution provided for a cause of action for libel in Article I, paragraph 6. The Court also rejected the argument that denial of the right to discover material potentially crucial to the cause of action was a violation of due process.

The ultimate holding of the Court was that the Shield Law's privilege against disclosure is absolute, there being no countervailing constitutional right compelling disclosure of sources and editorial processes in a libel case.

REASONS FOR GRANTING THIS WRIT

The effect of the New Jersey Supreme Court's decision in this case is to virtually foreclose any right of public officials or public figures to maintain a cause of action for libel. The practicalities of the Court's holding will be the elimination of discovery in libel suits and the consequent failure of public official and public figure plaintiffs to meet the requisite burden of proof.

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), established the standard of proof necessary for a public official in a libel action. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), extended those requirements to public figures. A public official or a public figure must prove that the defendant published a damaging falsehood "with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *New York Times, supra*, 376 U.S. at 280. In *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), recklessness was refined to the point that the plaintiff had to produce evidence "that the defendant in fact entertained serious doubts as to the truth of his publication". *St. Amant*, 390 U.S. at 731.

This trilogy of United States Supreme Court cases, all balancing the First Amendment right of a free press with an individual's interest in his reputation, imposed a heavy burden of proof on defamation plaintiffs. This burden made it essential that plaintiffs inquire into the conduct and state of mind of defendants.

Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), involved such inquiries. In that case this Court reiterated that "[s]preading false information in and of itself carries no First Amendment credentials. 'There is no constitutional value in false statements of fact.' *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340, 41 L.Ed.2d 789, 94 S.Ct. 2997 [1974]." *Herbert v. Lando, supra*, 60 L.Ed.2d at 131.

New Jersey has a "Shield Law", N.J.S.A. 2A:84A-21, *et seq*. The recently added sections of this law were in reaction to the New Jersey Supreme Court decision *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), cert.den.sub.nom. *New York Times v.*

New Jersey, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670, which arose from a criminal trial. See N.J.S.A. 2A:84A-21.1 through N.J.S.A. 2A:84A-21.13.

The basic section of the Shield Law, N.J.S.A. 2A:84A-21, is entitled "Newspaperman's privilege" and affords a privilege "to refuse to disclose . . . in any legal . . . proceeding . . ." sources through whom any information was "procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated or delivered; . . ." The latest amendment to this particular section was in 1977. It was not amended in 1980 when the later sections were added in response to *In Re Farber, supra.*

By interpreting the Shield Law as affording an *absolute* privilege against revelation of any information with regard to the writing of a defamatory article, the New Jersey Supreme Court has effectively foreclosed all public figures and public officials from attaining that evidence made necessary by *New York Times v. Sullivan, supra*, to carry the burden of proof. Thus, those persons are denied a right found to be constitutionally afforded them by the dissenting Justice in Article I, paragraph 6 of the New Jersey Constitution and a right afforded "ordinary citizens" in the normal course.

It is one thing to limit the exercise of a right; it is another to completely foreclose one class of citizens from exercising that right altogether. This amounts to a denial of equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution for that class of citizens, recently expanded in New Jersey to include those ordinary citizens who speak up at a public meeting. These citizens are now "public figures" in New Jersey, as well as those more easily categorized as such. See *Lawrence v. Bauer Publishing & Printing, Ltd.*, N.J. , A.2d (1982).

The Supreme Court of New Hampshire, in *Downing v. Monitor Publishing Co., Inc.*, 120 N.H. 383, 415 A.2d 683 (N.H. 1980), recognized the untenable position of defamation plaintiffs faced with both the *New York Times* burden of proof and an assertion of press privilege. Although there is no Shield Law in New Hampshire, that Court understood the consequences of affording an absolute privilege to the press.

> We hold that there is no absolute privilege allowing the press to decline to reveal sources of information when those sources are essential to a libel plaintiff's case. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), cert.den.sub.nom. *New York Times v. New Jersey*, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670. Even the President does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). *Downing*, 415 A.2d at 686.

As this Court noted in *Herbert v. Lando, supra,*

> In sum, contrary to the views of the Court of Appeals, according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times, Butts*, and similar cases.
> 60 L.Ed.2d at 129.

It is respectfully suggested that the New Jersey Supreme Court's decision in this matter places an intolerable burden upon a certain class of libel plaintiffs, which class was itself established by this Court's decisions, and which class has now effectively been denied a right afforded other citizens of the State of New Jersey.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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